BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TELMA VALLADARES	)	
Claimant	)	
VS.	)	
	)	Docket No. 237,034
IBP, INC.	)	
Respondent,	)	
Self-Insured	)	

ORDER

The employer, IBP, Inc., appealed the September 23, 2002 Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on March 11, 2003. Jeffrey K. Cooper of Topeka, Kansas, was appointed Board Member pro tem to serve in place of Board Member Gary M. Korte, who recused himself from this claim.

APPEARANCES

Stanley R. Ausemus of Emporia, Kansas, appeared for the employee, Telma Valladares. Gregory D. Worth of Roeland Park, Kansas, appeared for IBP, Inc.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, the record also includes a transcript from a February 19, 1999 preliminary hearing.

ISSUES

This is a claim for repetitive use injuries to Ms. Valladares' upper extremities and neck. The parties stipulated that Ms. Valladares' injuries arose out of and in the course of employment with IBP, Inc., and that the appropriate date of accident for these injuries was July 3, 1998. The principal issue submitted to the Judge was the nature and extent of Ms. Valladares' injuries and disability.

In the September 23, 2002 Award, Judge Avery determined Ms. Valladares sustained a 50 percent task loss and a 33 percent wage loss for a 41.5 percent permanent

partial general disability. In determining wage loss, the Judge imputed a post-injury wage of $6.10 per hour, or $244 per week.

IBP, Inc., contends Judge Avery erred. The company does not dispute the 33 percent wage loss finding. But the company does challenge the 50 percent task loss finding. The company contends Ms. Valladares has no task loss. Accordingly, IBP, Inc., requests the Board to modify the Award and find a 16.5 percent permanent partial general disability.

Conversely, Ms. Valladares does not dispute the 50 percent task loss finding but challenges the 33 percent wage loss finding. Ms. Valladares argues that if the Board does not affirm the Award, the Board should increase the permanent partial general disability by finding a 100 percent wage loss and a 75 percent permanent partial general disability. She contends the Judge erred by imputing a post-injury wage as she has made a good faith effort to find appropriate employment. Accordingly, Ms. Valladares requests the Board either to affirm the Award or increase the permanent partial general disability to 75 percent.

The nature and extent of Ms. Valladares' injuries and disability is the only issue before the Board on this appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds and concludes:

1. Telma Valladares developed pain in her upper extremities while working for IBP, Inc., performing a job called trim contamination.

2. In July 1998, after working approximately three months, Ms. Valladares advised the company nurse of her upper extremity symptoms. The company referred Ms. Valladares for medical treatment. After a period of conservative treatment and injections, Ms. Valladares eventually underwent two right carpal tunnel release surgeries, a left carpal tunnel release surgery and bilateral elbow surgeries.

3. The parties stipulated the appropriate date of accident for these repetitive mini-trauma injuries was July 3, 1998.

4. Ms. Valladares is from El Salvador and has a ninth grade education. Ms. Valladares speaks and understands some English but her primary language is Spanish. Ms. Valladares also has some training in data entry.

5. Other than a temporary job that lasted approximately two weeks, Ms. Valladares has not worked since October 8, 2000, when IBP, Inc., terminated her after determining it could not accommodate her medical restrictions. The temporary job paid $7.50 per hour.

6. At the April 2002 regular hearing, Ms. Valladares described the ongoing symptoms that she was experiencing in both upper extremities, including constant pain in both shoulders and arms, problems with raising her arms, pain in her neck and pain and cramping in her hands. At that hearing, Ms. Valladares also testified about her unsuccessful job search. Ms. Valladares introduced an itemized list of approximately 53 contacts that she had made while seeking employment from May 15, 2001, through August 1, 2001, when she stopped looking for work in Kansas. According to Ms. Valladares, she had looked for work before May 15, 2001, but she did not make a written record of her contacts. Ms. Valladares also introduced several documents at the regular hearing that indicated that she had contacted IBP, Inc., on August 7, September 5, September 12, September 20, and approximately September 28 and October 5, 2001, to review what jobs might be available through the bidding process.

7. In late November 2001, Ms. Valladares and her husband moved to Nashville, Tennessee. Ms. Valladares introduced into evidence 13 business cards, including three from the same employment agency, that represented the job contacts that she had made in Tennessee from December 2001 through February 2002. Because her husband underwent surgery in March 2002, Ms. Valladares began caring for him and, therefore, stopped looking for work.

8. Before Ms. Valladares moved to Tennessee, IBP, Inc., hired a vocational consultant, Mr. Dan Zumalt, to provide job placement services for her. But Ms. Valladares was unable to attend several appointments as she testified that on one occasion she had a doctor's appointment for high blood pressure and on another occasion she could not drive because of the medications that she had taken. Ms. Valladares met with the vocational rehabilitation consultant a total of four times. According to Ms. Valladares, the reason that she did not follow through with the consultant's job placement plan was that she was ill from having high blood pressure and that she felt pressured to attend their scheduled appointments despite her health problems and that the consultant wanted her to learn and to speak perfect English.

9. IBP, Inc., presented the testimony of Mr. Zumalt, who first met with Ms. Valladares in early February 2001. Based upon his evaluation, Mr. Zumalt determined Ms. Valladares could perform housekeeping work, which was a job that she had performed in the past. Therefore, Mr. Zumalt conducted a labor market survey in

the Emporia, Kansas, area and determined there were sufficient opportunities to develop a placement plan. The labor market survey revealed that Emporia area housekeeping jobs paid between $5.40 and $7.88 per hour, or in the neighborhood of $6.10 per hour. When drafting Ms. Valladares' job placement plan, Mr. Zumalt used the $6.10 per hour, or $244 per week, as the plan's earnings goal.

10. On March 15, 2001, Mr. Zumalt presented the job placement plan (which included training regarding interviewing skills, resume writing and preparing job applications) to Ms. Valladares, who requested an opportunity to speak with her attorney. On May 15, 2001, Ms. Valladares notified Mr. Zumalt that she wanted to proceed with the plan. But from the outset Ms. Valladares had problems complying with the plan. The plan initially called for two days of intense training. Although she was requested not to bring children to that training, Ms. Valladares brought a grandchild. When asked not to bring the child for the second day of training, Ms. Valladares did not comply. Moreover, Ms. Valladares did not complete the homework assignment that was given her at the end of the first day of the training session. Later, due to alleged health problems Ms. Valladares missed an appointment where she was to be videotaped during a mock interview. Also, Ms. Valladares was provided several job leads. But it is questionable that Ms. Valladares followed up on those leads, nor does it appear that she ever contacted the 15 employers per week that the plan required. Eventually, Ms. Valladares withdrew from the placement plan due to alleged health problems.

11. Judge Avery requested board-certified orthopedic surgeon Dr. Theodore L. Sandow, Jr., to evaluate Ms. Valladares for this claim. The doctor examined Ms. Valladares in January 2001 and rated Ms. Valladares' bilateral upper extremity injuries as comprising a 24 percent whole person functional impairment under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). The doctor reviewed a list of former work tasks that Ms. Valladares had performed. The list, which was prepared by vocational counselor James Molski, itemized 10 work tasks, but only eight of the 10 were tasks that Ms. Valladares had performed in the 15-year period before developing her bilateral upper extremity injuries. The other two tasks in the list were performed after the date of accident.

12. Dr. Sandow testified that Ms. Valladares should not perform work tasks requiring constant repetitive use of her upper extremities. Although the doctor believed Ms. Valladares' carpal tunnel problem was caused by repetitive activities, the doctor initially testified that he did not believe Ms. Valladares should be restricted from performing any of her former work tasks, including the meat trimming and using a knife and hook. But later the doctor testified that he and Ms. Valladares did not discuss her former job as a contamination trimmer and that it was difficult for him

to determine whether or not Ms. Valladares should perform her former work tasks. The doctor testified, in part:

> Q. (Mr. Ausemus) . . . During the period of time that you saw this patient, you obviously did not discuss with her what she was doing; is that correct, sir?
>
> A. (Dr. Sandow) Do you mean her job at that time?
>
> Q. Yes, sir.
>
> A. No, I did not.
>
> Q. Would it be fair to say that given the description as you view them her *[sic]* it's difficult for you to make a determination as to whether she can or cannot do some of these tasks?
>
> A. They don't state clearly whether it's something that's done for the eight-hour shift or if it's a one-hour procedure or things like that, which I think you would need to know.[1]

13. On the other hand, Dr. Pedro A. Murati, who was one of Ms. Valladares' treating physicians, testified that Ms. Valladares sustained a 22 percent whole person functional impairment due to her upper extremity injuries. The doctor, who last saw Ms. Valladares in July 2000, reviewed Mr. Molski's list of former work tasks and determined that due to the bilateral upper extremity injuries Ms. Valladares should no longer perform four of eight, or 50 percent, of the work tasks that Ms. Valladares performed in the 15 years before her July 1998 accident.

14. Because Ms. Valladares' injuries comprise an "unscheduled" injury, the permanent partial general disability is determined by the formula set forth in K.S.A. 1998 Supp. 44-510e. That statute provides, in part:

> **Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto.** The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, **has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the**

[1] Sandow Depo. at 21.

> **fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. **Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.** An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

But that statute must be read in light of *Foulk*[2] and *Copeland*.[3] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wages should be based upon the ability to earn wages rather than actual post-injury wages when the worker fails to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[4]

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[2] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[3] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[4] *Id.* at 320.

The Kansas Court of Appeals in *Watson*[5] recently held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker fails to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based on all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[6]

15. Judge Avery concluded that Ms. Valladares sustained a 24 percent whole person functional impairment and a 50 percent task loss due to her bilateral upper extremity injuries. The Board agrees. First, the 24 percent whole person functional impairment rating, which was based upon Dr. Sandow's testimony, was very close to Dr. Murati's 22 percent whole person rating for the upper extremities. Second, the 50 percent task loss is supported by Dr. Murati's testimony. Dr. Sandow's testimony is of little help in determining Ms. Valladares' task loss as the doctor's testimony was somewhat contradictory. In short, Dr. Sandow determined that Ms. Valladares' injuries were caused by her repetitive work activities and that Ms. Valladares should avoid repetitive work activities, but that Ms. Valladares' work activities were not too repetitive so as to be avoided.

16. Judge Avery concluded that Ms. Valladares had failed to make a good faith effort to pursue appropriate employment and, therefore, imputed a post-injury wage of $6.10 per hour, or $244 per week, and found a 33 percent wage loss. The Board agrees. The evidence establishes that Ms. Valladares did not cooperate with Mr. Zumalt and, further, that Ms. Valladares did not exert much effort in looking for employment from August through November 2001. When considering the entire record, the Board is not persuaded that Ms. Valladares has made a good faith effort to find appropriate employment.

17. As indicated above, the Board affirms Judge Avery's findings of a 33 percent wage loss and a 50 percent task loss for a 41.5 percent work disability. The Board adopts

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[5] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[6] *Id.* at Syl. ¶ 4.

the findings and conclusions set forth in the Award that are not inconsistent with the above.

AWARD

WHEREFORE, the Board affirms the September 23, 2002 Award entered by Judge Avery.

IBP, Inc., filed its application for review in this appeal under docket numbers 237,034 and 264,852. As it appears the appeal under docket number 264,852 was made in error, the Board dismisses that appeal.

IT IS SO ORDERED.

Dated this ____ day of March 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Director, Division of Workers Compensation